



Group Interest in Hungary

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Abstract. In company law, there is a basic principle that the company is an autonomous legal entity and independent from other subjects of law. In the relationship of the parent company and the subsidiaries, we can find two perspectives:

– on the one hand, an economic perspective: the separate corporations constitute one enterprise (the subsidiaries are or can be instructed/directed by the parent company), the group of corporations is a unitary business entity;
– on the other hand, a legal perspective: the coherence and the conflict among the interest of the parent company, the interest of the subsidiaries, and the interest of the group.¹

Keywords: parent company, subsidiaries, group of corporations, group interest, concern law

I. Fundamental and General Statements in Connection with the Hungarian Group of Corporations

In Hungary, the law of groups of corporations is a special field of company law, but also regulated by the Capital Market Act.² The concern: a participant of the economic life acquires influence concerning the mechanism of decision-making in the limited liability company, stock company, grouping and cooperative society registered in the Firm Registry and operated independently; as a result of that, the companies/associations keep their legal independence, but they constitute

1 Conac 2013. 195, 215.

2 CXX of 2001.

an economic unit. Within the law of groups of corporations, we can separate the recognized (qualified) concern and the de facto (actual/real) concern.³ The recognized concern is based on a contractual relationship, on a control contract. The de facto concern is founded on the fact of influence acquisition, without concluding a contract.⁴

The essence of influence⁵ can be:

- a ‘voting concern’, where a member acquires the determined percentage of votes and exercises his/her voting rights,⁶ or
- the right to appoint, to recall, and to establish the remuneration of the executive officers and members of the supervisory board, or
- other way which provides decisive direction and checking for the controlling company above the operation of the controlled company.⁷

There are two points of view in Hungary in connection with the foundation of concern situation:

- a concern situation comes into existence only when the acquisition of share is based on a legal transaction (on privity), but not on a legal fact (for example, inheritance), and not on the organizational amendment (for example, merger);⁸

3 For details, see: Vecsey 2013. 736–745.

4 Papp 2014. 449.

5 Act V of 2013 Section 8:2 Influence:

- (1) majority control means a relationship where a natural or legal person (holder of a participating interest) controls over 50% of the voting rights in a legal person, or in which it has a dominant influence.
- (2) The holder of a participating interest is deemed to have dominant influence on a legal person if it is a member of or shareholder in that company and:
 - a) it has the right to appoint and recall the majority of the executive officers or supervisory board members of the legal person; or
 - b) other members of or shareholder in that legal person are committed under agreement with the holder of a participating interest to vote in concert with the holder of a participating interest, or they exercise their voting rights through the holder of a participating interest, provided that together they control more than half of the votes.
- (3) Majority control is also deemed to exist if the entitlements referred to in subsections 1–2 are provided indirectly for the holder of a participating interest.
- (4) Indirect control on a legal person means a relationship where a person is able to exercise influence on a legal person that has voting rights in that legal person (intermediary legal person). The scope of indirect control means the percentage of control held by the intermediary legal person, which corresponds to the percentage of control the holder of a participating interest has in the intermediary legal person. If the holder of a participating interest controls more than half of the votes in the intermediary legal person, the control the intermediary legal person has in the legal person shall be taken into account in its entirety as indirect control held by the holder of a participating interest.
- (5) The direct and indirect ownership interest and voting rights of close relatives shall be applied contemporaneously.

6 BDT 2002. 173 (Casebook of the Courts).

7 Papp 2014. 449.

8 Vezekényi 2002. 11.

– according to the other opinion, there is no importance of the legal title of the acquisition, the legal grounds can be *ipso iure* or *succession*.⁹

The acquisition of influence is not equivalent to the acquisition of share it can be established by facts of both company law and private law.¹⁰ The fact and the measure of influence adjust to the proportion of votes; it can be reached by a determined percentage of votes or by share with priority voting rights or by establishment of usufruct on the other members' shares or if the other members have shares with priority rights but without voting rights.¹¹

The subjects of the concern situation are the controlling/parent company and the controlled companies/subsidiaries. A group of corporations may consist of stock companies, limited liability companies, groupings, and cooperative societies.¹² If a group of corporations is led jointly by several legal persons, they shall enter into an agreement to determine the one enabled to exercise the rights of the dominant member in accordance with the control contract.¹³

The concern law regulates only the acquisition of influence in existing companies, it is irrelevant to the influence originating at the timepoint of the foundation of companies.¹⁴ The regulation of concern law is divided into two parts: the rules of process and legal effect of acquisition of influence (general and dynamic regulation of concern law) and the provisions for special rights and duties connecting with the existing influence (particular regulation of concern law).¹⁵

The recognized group of corporations means a form of featuring a common business strategy among at least one dominant member that is required to draw up consolidated annual accounts and at least three members controlled by the dominant member under a control contract.¹⁶ By reason of this, the conjunctive conditions in order to establish the recognized group of corporations are the following: at least one controlling member (with commitment to draw up consolidated annual accounts), at least – permanently – three members controlled by the parent company, and these members conclude a control contract (for lack of the control contract, the recognized group of corporations cannot be presumptive)¹⁷ based on a common business strategy. The recognized group of corporations is neither a legal entity nor a legal person,¹⁸ and *per se* the owner relation cannot justify the existence of concern (holding company).¹⁹

9 LB Gfv. XX. 31654/200/5; LB Gf. I. 32620/2000/10 (Decisions of the Supreme Court).

10 Papp 2014. 539.

11 Auer, Bakos, Buzás, Farkas, Nótári, Papp T. 2011. 539.

12 Section 3:49 (2) of Act V of 2013 (Hungarian Civil Code; hereafter abbreviated: CC).

13 Section 3:49 (3) of CC.

14 Papp 2014. 540.

15 Papp 2014. 540.

16 Section 3:49 (1) of CC; Miskolczi-Bodnár 2014. 148–150.

17 FfT 4. Kf. 27.538/2010/5 (Decision of the High Court of Appeal).

18 Papp 2014. 449; FfT 2. Pf. 21.729/2010/4 (Decision of the High Court of Appeal).

19 Curia Kfv. VI. 37.376/2011/8.

II. The Group Interest

By means of exercising influence, the controlling company can enforce its interests during the operation of the group of corporations. Through it, the interest-identity between the dominant member and the company can be adversely affected, the interest of the controlling member does not necessarily suit the object of the company. One of the duties of concern law is to balance the conflict of interests between the parent company and the subsidiaries,²⁰ as the exercising of influence concerns the minority of the controlled companies and also their creditors.²¹

This conflict of interests (concern conflict) between the dominant member and the company is legally legitimate, and the ‘Treupflicht’ is effective only in the de facto concern.²² The subsidiaries are operating under unified direction (in economic sense) and typically according to the interests of the dominant member.²³ The dominant member subordinates the controlled companies to its business interests in return for adequate compensation of detriments.²⁴ The interests of the group of corporations are primary until the subsidiaries (and their stakeholders: members and creditors) can proportionally share in the benefits of the concern situation and also in the fair dividing of the disadvantages of the group of corporations.²⁵ It means that in the recognized group of corporations the dominant member cannot instruct unlimitedly the management of the controlled companies, and the concern situation does not grant exemption from the liability of the controlled companies’ directors for detriments caused by the execution of the dominant member’s decisions.²⁶ Tamás Sárközy is of the opinion that:

- the necessary minimum of the autonomy shall be provided for subsidiaries;
- the subsidiaries’ management can be instructed only for the reason and to the extent of the performance of the business political conception of the group of corporations.²⁷

The recognized group of corporations comes into existence by concluding the control contract (Beherrschungsvertrag, dominating agreement). If only the dominant member holds any share in the controlled member of a group of corporations, no control contract is required; instead, the mandatory layout of the control contract shall be provided for in the instrument of constitution of the dominant member and the controlled member.²⁸ The control contract lays down

20 Papp 2014. 538.

21 Papp 2014. 540.

22 Darázs 2003. 168.

23 Darázs 2003. 169.

24 Darázs 2003. 182.

25 Gadó 2004. 4.

26 Gadó 2004. 4, Darázs 2003. 175.

27 Sárközy 2003. 31, Gadó 2004. 4.

28 Section 3:54 of CC.

the common business strategy for a group of corporations.²⁹ The control contract shall, *inter alia*, contain the following:

- the corporate names and registered offices of the dominant member and the controlled members;
- the mode of cooperation within the group, including the key aspects;
- an indication as to whether the group of corporation is established for a limited period of time or for an indefinite duration.³⁰

The autonomy of the controlled companies may be restricted in the manner and to the extent specified in the control contract with a view to achieving the common business objective³¹ or the fulfilment of the aim of the group of corporations as a whole.³² The control contract shall provide for the protection of the rights of the controlled members and for the protection of creditors' interests.³³ The general provisions pertaining to contracts shall also apply to control contract.³⁴ The control contract restricts the economic independence of the controlled companies and makes possible to realize a unified business conception; the members are acting in the interests of the concern.³⁵

In my opinion, the recognition of the group interest can be realized through the content of the control contract and by the determination of the common business strategy. As far as I can see, the common business strategy is not the same as the group interest, the latter being a narrower category: the common business strategy includes the group interest as well, but even more than that (see: business plans, financial reports, budget, business conceptions, organizational relations, etc.). The group's common business strategy is an 'action programme': the establishment and planning of the strategic and market transactions for a long period, the development of the economic and management conception, drafting the business principles and goals, etc.³⁶ The recognition of the group interest is tangentially expressed in the Hungarian Civil Code in connection with the liability of the subsidiaries' executive officers: the executive officer of a controlled member shall manage the controlled member in accordance with the control contract, under the governance of the dominant member, based on the primacy of the business policy of the group of corporations as a whole; the executive officer shall be exempt from liability to members if his conduct is found to be in compliance with provisions set out in the relevant legislation and in the control contract.³⁷

29 Section 3:50 (1) of CC.

30 Section 3:50 (2) of CC.

31 Section 3:50 (3) of CC.

32 FfT 2. Pf. 21.729/2010/4 (Decision of the High Court of Appeal).

33 Section 3:50 (3) of CC.

34 Section 3:50 (4) of CC.

35 Darázs 2003. 175.

36 ÍH 2005. 34 (Decision of the High Court of Appeal), Vecsey 2013. 734.

37 Section 3:55 (4) of CC.

The management of the dominant member shall have the right to give instructions to the management of the controlled member as specified in the control contract, and to issue binding resolutions relating to the controlled member's operations. If the dominant member's actions are in compliance with the control contract, the provisions of the Civil Code pertaining to the supreme body's exclusive jurisdiction and to management autonomy shall not apply to the controlled member.³⁸ The executive officers and supervisory board members of the dominant member may also serve at the controlled member as executive officers and supervisory board members.³⁹ In single-member business associations, the sole member may instruct the management, which the executive officer is required to carry out.⁴⁰ These consequently result that the group interest is equal to the interest of the dominant member.

Inside of the group of corporations, there can be a cost-sharing based on an agreement for refunding of expenses – this is familiar at the R&D (Research and Development) firms.⁴¹

III. Safeguards Contrary to the Parent Company in Concern Law

1. Transparency

The dominant member shall make a public announcement on the formation of the group of corporations within 8 days after gaining knowledge of the last decision on the approval of the control contract on two occasions, at least 30 days apart.⁴² The public announcement shall contain the control contract and a notice addressed to the creditors and shareholders of the controlled members.⁴³ The management of the dominant member shall submit an application to the Court of Registry for the registration of the group of corporations within 60 days after gaining knowledge of the last approval of the control contract;⁴⁴ and the firm registry is authentic and public. After the registration, the provisions relating to

38 Section 3:55 (1) of CC.

39 Section 3:55 (3) of CC.

40 Section 3:112 (3) of CC.

41 LB Kfv. I. 35.550/2008/5 (Decision of the Supreme Court), Fővárosi Bíróság 16. K. 31.115/2007/8 (Decision of the Budapest City Court).

42 Section 3:51 (3) of CC.

43 Section 3:51 (4) of CC.

44 Section 3:51 (5) of CC.

members with a qualifying holding shall not apply to the group of corporations and its members.⁴⁵

2. The Buyout Right of the Subsidiaries' Members

The members of a controlled company that participates in a group of corporations may request within a 30-day preclusive period following the second publication of the notice on the formation of the group of corporations that their shares be purchased by the dominant member at the market value prevailing at the time of publication of the announcement.⁴⁶ A group of corporations may be registered if all rightful claims of the members of the controlled legal persons have been satisfied or if the court has dismissed the request of the members in a legal action brought to that effect.⁴⁷

3. The Rights of the Subsidiaries' Creditors

If a creditor lays any claim to a controlled member participating in the group of corporations at the time of the first publication of the announcement, the creditor may demand adequate safeguards from the controlled member within a 30-day preclusive period following the second publication of the announcement.⁴⁸ Any creditor whose claim is already guaranteed – pursuant to statutory provision or contract – shall not be entitled to demand such safeguards, including if it is not justified in the light of the controlled member's financial standing or of the contents of the control contract.⁴⁹

45 Section 3:53 of CC, Section 3:324 of CC: Extra commitments of members with a qualifying holding:

- (1) Where a member of a limited liability company or a shareholder of a private company limited by shares – directly or indirectly – controls at least 3/4 of the votes, the Court of Registry shall be notified thereof within 15 days from the time of acquisition of such qualifying holding for the purpose of registration and publication.
- (2) Within a 60-day preclusive period reckoned from the date of notification of the acquisition of a qualifying holding, any member (shareholder) of the company may request that his shares be purchased by the owner of the qualifying holding. The owner of a qualifying holding must purchase such shares at the market value prevailing at the time when the request was submitted, which value may not be lower than the value the shares represent in the company's own capital.
- (3) If the company is dissolved without succession, at the request of the creditors, the owner of the qualifying holding shall cover any claim for which no satisfaction had been provided, provided that the dissolution without succession was brought about in consequence of the poor business decisions of the owner of the qualifying holding. This provision is not applicable in the case where the company is wound up without going into liquidation.

46 Section 3:52 (1) of CC; BH 2006. 91 (Court Order); SZIT-H-Gf-2009-78 (Decision of the High Court of Appeal of Szeged).

47 Section 3:52 (3) of CC.

48 Section 3:52 (2) of CC.

49 Section 3:52 (2) of CC.

A group of corporations may be registered if all rightful claims of the creditors of the controlled legal persons have been satisfied or if the court has dismissed the request of the creditors in a legal action brought to that effect.⁵⁰

Any creditor of the controlled member whose claim reaches 10% of the controlled member's subscribed capital may request the management of the dominant member to provide information on the implementation of the control contract, and on the controlled member's financial standing. If the management of the dominant member fails to comply with the request or if the information supplied is insufficient, the creditor may request the Court of Registry to adjudicate that the dominant member is in breach of the control contract.⁵¹

4. Protection of the Minority Stakeholders

A group of members controlling at least 5% of the voting rights in the controlled company and the executive officers of the controlled company may request that the supreme body of the dominant member be convened if they notice any substantive or repeated breach of the control contract. If the management of the dominant member fails to comply with such a request within 15 days from the date of receipt, and fails to convene the meeting of the supreme body within 30 days, the Court of Registry shall convene the meeting of the supreme body at the request of the members making the proposal or shall empower the requesting members to convene the meeting within the prescribed deadline. The costs of the meeting shall be advanced by the dominant member; however, if the request is found unsubstantiated, the costs shall be borne by the requesting parties.⁵²

5. Employee Participation

If employee participation in the supervisory board is mandatory in at least three controlled members of a registered group of corporations, the supreme body of the dominant member may permit, if so requested by the work councils concerned, that the representatives of employees participate in the supervisory board of the dominant member instead of the supervisory bodies of the controlled members. In that case, the instrument of constitution of the dominant member shall provide for the setting up of a supervisory board if the given member did not have one. The mode of delegation of the representatives of employees in that case shall be regulated by way of an agreement (under the general provisions for contracts) among the management of the dominant member and the work councils of the controlled members affected.⁵³

50 Section 3:52 (3) of CC.

51 Section 3:56 (2) of CC.

52 Section 3:57 of CC.

53 Section 3:58 of CC.

6. Regulation of the Relations between the Management of the Dominant Member and the Controlled Member

The management of the dominant member shall have the right to give instructions to the management of the controlled member as specified in the control contract, and to issue binding resolutions relating to the controlled member's operation. If the dominant member's actions are in compliance with the control contract, the provisions of the Civil Code pertaining to the supreme body's exclusive jurisdiction and to management autonomy shall not apply to the controlled member.⁵⁴

If the control contract provides facilities to delegate competence upon the dominant member for the election and recall of the controlled member's executive officers and supervisory board members, and for determining their remuneration, an employee of the dominant member may be appointed as director of the controlled company.⁵⁵

The executive officers and supervisory board members of the dominant member may also serve at the controlled member as executive officers and supervisory board members.⁵⁶

The management of both the dominant member and the controlled member shall report to their supreme body at the intervals fixed in the control contract, but at least once a year on the fulfilment of the objectives set out in the control contract. Any provision of the control contract providing for a less frequent reporting obligation shall be null and void.⁵⁷

7. Measures of the Court of Registry

In the event of any major or repeated breach of the control contract, the Court of Registry shall, upon request by either of the parties with legal interest:

- call on the dominant member to abide by the control contract;
- introduce supervisory measures;
- dissolve the group of corporations.⁵⁸

Besides the safeguards contrary to the controlling company in the concern law, other measures can be found in the Hungarian company law for protection of the subsidiaries – non-exhaustive list:

- the information right of the controlled member;⁵⁹

⁵⁴ Section 3:55 (1) of CC.

⁵⁵ Section 3:55 (2) of CC.

⁵⁶ Section 3:55 (3) of CC.

⁵⁷ Section 3:56 (1) of CC.

⁵⁸ Section 3:60 of CC.

⁵⁹ Section 3:23 of CC: Confidentiality and obligation of information:

(1) The executive officer is required to keep the members of the legal person informed concerning the legal person, and to provide access for them to the legal person's documents, records,

- the prohibition of voting during the passing resolution;⁶⁰
- the liability for the legal person's debts (transfer of liability, *Übergang der Haftung*);⁶¹
- the piercing of the corporate veil (*Haftungsdurchgriff*);⁶²
- the wrongful trading,⁶³ but this provision in the Civil Code does not accord with other relevant rules (§ 118/B in Firm Act and § 33/A in Bankruptcy Act) and with the provision on the liability of the subsidiaries' executive officers (Section 3:55 (4) of Civil Code);
- the safeguards for the lawful operation of the legal person (the judicial oversight of the Court of Registry,⁶⁴ the judicial review of the resolution of legal person by court,⁶⁵ the protection of minority stakeholders,⁶⁶ the arbitration proceeding,⁶⁷ etc.).

and registers. The executive officer shall be entitled to request a written declaration of confidentiality before the provision of information or access.

- (2) The executive officer may refuse to give information and to provide access to documents if this would infringe upon the legal person's trade secrets, if the requesting party exercises his right in a manner which is abusive, or if he refuses to make a declaration of confidentiality despite having been asked to do so. If the requesting party considers the refusal of information unjustified, he may request the Court of Registry to order the legal person to provide access to the information.

60 Section 3:19 (2) of CC: Passing resolution:

- (2) In the process adopting a resolution the following persons may not vote:

- a) any person for whom the resolution contains an exemption from any obligation or responsibility, or for whom any advantage is to be provided by the legal person;
- b) any person with whom an agreement is to be concluded according to the resolution;
- c) any person against whom legal proceedings are to be initiated according to the resolution;
- d) any person whose family member has a vested interest in the decision, who is not a member or founder of the legal person;
- e) any person who maintains any relation on the basis of majority control with an organization that has a vested interest in the decision; or
- f) any person who himself has a vested interest in the decision.

61 Section 3:2 (2) of CC: Liability for the legal person's debts:

- (2) In the event of abuse of limited liability on the part of any member of a legal person, on account of which any outstanding creditors' claims remain unsatisfied at the time of the legal person's dissolution without succession, the member in question shall be subject to unlimited liability for such debts.

62 Section 6:540 of CC: Liability for the acts of members of legal persons:

- (2) If a member of a legal person causes damage to a third party in connection with his membership, liability in relation to the injured person lies with the legal person.
- (3) Liability of the member and the legal person shall be joint and several if the damage was caused intentionally.

63 Section 3:118 of CC: Liability of executive officers in respect of third parties:

In the event of a business association's dissolution without succession, creditors may bring action for damages up to their claims outstanding against the company's executive officers on the grounds of non-contractual liability, should the executive officer affected fail to take the creditors' interests into account in the event of an imminent threat to the business association's solvency. This provision is not applicable in the case where the company is wound up without going into liquidation.

64 Section 3:34 of CC; §§ 72–91 of Firm Act.

65 Sections 3:35–3:37 of CC.

66 Sections 3:103–3:106 of CC.

67 Section 3:92 of CC.

IV. The Disadvantageous Group's Common Business Strategy and the Types of Liability

If any controlled member of the group is undergoing liquidation, the dominant member shall be held liable for any debt the member may have outstanding; the dominant member shall be relieved of liability if able to verify that the controlled member's insolvency did not arise as a consequence of the group's common business strategy⁶⁸ (secondary, unlimited liability).⁶⁹ The instruction right of the dominant member and its result, the dependent situation of the controlled member is the reason for the liability of the dominant member.⁷⁰ A casual relation must be between the disadvantageous group's common business strategy and the insolvency of the controlled member: the business policy of the group of corporations caused the detriment (reduction of the assets) of the controlled member; the liability of the dominant member following each other is not joint and several.⁷¹

We have to take into account the disadvantageous common business strategy from the aspect of the controlled member and have to examine the activity of the dominant member.⁷²

The continuation of the disadvantageous common business strategy shall be qualified as wilful, intentional, and seriously actionable conduct.⁷³

The loan/credit and its partial ceasing by the dominant member to the controlled member, the attempt to sell the share of the dominant member, the single disadvantageous activity of the dominant member, the entering into loss-making contracts by the dominant member, and the infringement of the rules of the accounting act by the dominant member do not base the establishment of the continuation of the disadvantageous common business strategy by the dominant member on the Hungarian jurisdiction.⁷⁴ If the origin of the detriments of the controlled member can be traced back to objective economic processes and changes, and therefore the termination of the loss-making subsidiary by the dominant member is a rational owner's decision, then it cannot be considered as the base of the liability of the dominant member.⁷⁵ If both the dominant member and the controlled member have losses in consequence of a bad business decision, then it does not mean a disadvantageous common business strategy; the overall

68 Section 3:59 of CC; BH 2007.418; BH 2005. 187 (Court Orders).

69 ÍH 2006. 123; ÍH 2006. 77 (Decisions of the High Court of Appeal).

70 ÍH 2004. 36 (Decision of the High Court of Appeal).

71 2013. P.4 (Decision of the Curia).

72 BH 2008. 91 (Court Order); Török 2009. 181.

73 Török 2009. 181.

74 BH 2008. 91 (Court Order).

75 EBH 2005. 1228 (Decision of the Supreme Court).

effect exercised by particular harms is authoritative for the establishment of the disadvantageous common business strategy.⁷⁶

If the business decisions of the dominant member cause losses to the controlled member, and the advantages and disadvantages of these decisions are balanced within the concern, this conduct of the dominant member establishes the liability of the parent company for the continuation of disadvantageous common business strategy.⁷⁷ The disadvantageous common business strategy can be realized by the negligence of the dominant member,⁷⁸ by its inactive conduct (no compensation of the subsidiary's loss, no reduction of the capital of the controlled member, no money for the maintenance of the subsidiary's real estates) in that interest of reaching own economic aims.⁷⁹ This decision of the Hungarian Curia is a controversial question in Hungarian legal literature:⁸⁰ the legal ground of the liability of the dominant member can be a negligence, but only then, when this negligence is an infringement of the rules of law or of the instrument of constitution; otherwise, the Curia gives priority to the creditors' protection against the owner's interest.

We can also find a provision for the responsibility of the controlling company in the act on bankruptcy proceedings and liquidation proceedings, and it is not quite harmonious with the regulation in the Hungarian Civil Code.⁸¹ In respect of the liquidation of a company under control by qualified majority, a single-member company or a sole proprietorship, the controlling party or the sole member (shareholder) shall be responsible without limitation for the company's liabilities which are not covered by the debtor's assets during the liquidation proceedings, if the court has established the unlimited and full liability of such member (shareholder) for the company's debts pursuant to a claim filed by the creditor during the liquidation proceedings or within a 90-day preclusive period following the time of publication in the *Cégközlöny* (Firm Gazette) of the resolution on the final conclusion of liquidation proceedings, on account of such member (shareholder) having had a permanent disadvantageous business strategy from the standpoint of the debtor company.⁸² The content of the statements of facts in Civil Code and in Bankruptcy Act is different:

- the dominant member controls over 75% or 100% of the voting rights in the controlled member on the ground of the Bankruptcy Act;
- the liability of the parent company is valid under liquidation in the Bankruptcy Act and after liquidation in the Civil Code;

76 ÍH 2006. 126 (Decision of the High Court of Appeal).

77 EBH 2004. 1038 (Decision of the Supreme Court); *Winner* (ed.) op. cit. 734.

78 BDT 2012. 2645 (Casebook of the Courts); *Nochta* 2014. 238.

79 Kúria Gfv. X. 30.082/2012 (Decision of the Curia).

80 Szegedi 2013 26–30.

81 Act XLIX of 1991 Section § 63 (2).

82 *Winner* (ed.) 2013, 788–789.

– for claims, there is a preclusive period in the Bankruptcy Act, but the general term of limitation is to be found in the Civil Code;

– the condition ‘permanent’ is required in the Bankruptcy Act, and not in the Civil Code in connection with the continuation of the disadvantageous common business strategy;

– the dominant member is liable for any debt of the controlled member which remained unsatisfied by the subsidiary’s assets in accordance with the Civil Code, but as to Bankruptcy Act the controlling company is liable only for such debts which were claimed by the creditors during the liquidation process or within a preclusive deadline;

– the provision of the Civil Code emphasizes the causal relation between the liquidation of the controlled member and the common business strategy.

The act on public firm information, firm registry, and winding-up proceedings also mentions the liability of the dominant member.⁸³ If the Court of Registry removed a firm with member’s limited liability from the firm register by way of involuntary de-registration procedure, the firm’s former member – registered at the time of de-registration – shall bear unlimited liability for the outstanding claims of the firm’s creditors, if found to have abused his limited liability. A member is considered to have abused his limited liability if having had a permanent disadvantageous business strategy or who disposed of the firm’s assets as his own or who supported a resolution, in respect of which he knew, or should have known given reasonable care that such resolution was clearly contrary to the significant interests of the firm. Here there are also differences between the contents of the statements of facts in Civil Code and Firm Act:

– the rule in the Firm Act can be applied only to the member of the limited liability company, for the shareholder and for the member of the cooperative, but not for the member of a grouping (where the member has secondary and unlimited liability); opposite to this, the regulation in the Civil Code refers to all legal entities in concern law;

– the condition ‘permanent’ is required in the Firm Act, and not in the Civil Code in connection with the continuation of the disadvantageous common business strategy;

– the continuation of the disadvantageous common business strategy is identical with the abuse of a member’s limited liability in the Firm Act;

– the liability of the dominant member can be established only after the involuntary de-registration procedure according to the Firm Act;

– the provision of the Civil Code underlines the causal relation between the liquidation of the controlled member and the common business strategy.

83 Act V of 2006 §§ 118/A (1), (2)

After this short overview, I can point out that in Hungary there is no recognition of group interest (neither in regulation nor in the articles of association). From the aspect of group interest, there cannot be found any difference between private and public company or between wholly-owned subsidiaries and others. In Hungarian single-member companies, management must follow the instructions by the parent company, and there are no provisions for the management of controlled members to obey the unlawful instructions of the dominant member. Therefore, I reckon that it is necessary to clarify the concept of group interest, and on its ground the relation among parent company and subsidiaries (for example: according to the instruction right of the controlling company) in Hungary, but also at the EU level, in order to provide a ‘safe harbour’ for managers of controlling and controlled companies against civil and criminal liability.

V. The Group Interest in Public Companies in Hungary

At the examination of the group interest from a corporate law perspective, the category of publicly owned economic companies (public companies) forms a specific field. Although corporate law, as a universal field, sets the directive to all sectors as background law,⁸⁴ and the specific prescriptions of law directive to each different field are included in branch regulations of law, we must still distinguish the public companies. To be more precise, these are specific from several aspects, and thus cannot be regarded merely as one separate branch of economy.

1. The Denotation and Classification of Publicly-Owned Economic Companies (Public Companies)

When we are examining the enterprises and economic companies owned by the state, we must make mention of the privileges of the proprietries as of the municipalities (local self-governments). The Basic Law (formerly: The Constitution) of Hungary declares it in its article on ‘The Public Finances’ that the proprietries of both the state and the municipalities comprise the national property.⁸⁵ The Basic Law, however, declares it separately that the economic organizations owned by the state and the municipalities conduct their economy in the manner determined by acts of law, independently and responsibly, in accordance with the demands imposed by legality, appropriateness, and

84 See: Decision 59/1991 – Constitutional Court of Hungary.

85 Basic Law Article 38. paragraph (1).

productivity.⁸⁶ The municipalities hold a privileged position in the Hungarian constitutional settlement,⁸⁷ and the same applies to their property as well. Consequently, in the Hungarian legal terminology, when we use the term ‘state property’ as a synonym to ‘public property’, in the used (first) term the municipality’s property is unentailed. In case we intend to use the term consistently, then we must say in every instance ‘the property of the state and of the municipalities’ altogether. For the rest of the study, we shall use the term ‘public company’, by which we shall mean economic companies operating through either state- or a municipality’s shareholding.⁸⁸

State proprietorship in general distorts the freedom of economic competition anyway, the consequences of which in economics have been common. Yet, at the same time, the degree of the presence of the state among economic organizations is certainly a matter of public politics’ decision-making.⁸⁹ In this regard, according to the Hungarian regulations of law in effect, from a civil-law perspective and in terms of the relation between the state and economic companies, we can essentially differentiate between the following three types of state presence. The first case scenario is when the state runs an economic company or is a shareholder in a strategic type of economic company.⁹⁰ From this, the next case scenario separates, in which the state presence is needful, whereby it partakes in the economic vitality, which is in other words: the field of public services/utilities. Here, the state presence does not require any proof or justification, unlike the reason why these should operate in the form of economic companies.⁹¹ In our view, these do not necessarily need to operate as economic companies for there are such (typically of public-law) legal-subject categories available, the application of which leads to the achievement of the aimed target. The dissimilar third case scenario category involves companies with peculiar public-law relevance, status such as Hungary’s central bank, The Hungarian National Bank (MNB).⁹² The Hungarian National Bank is a legal entity, operating in the form of a joint-stock (public) company.⁹³ In our view, the Hungarian National Property Management plc (MNV Zrt.) falls into the same category as well, which is a one-man joint-stock (public) company founded by the state, and the stock of which

86 Basic Law Article 38. paragraph (5).

87 Basic Law Article 31.

88 On this terminology, see Act No 2009. CXX. 1. § a) point.

89 For instance, the banking sector or the energy industry regarded like that.

90 The Magyar Villamos Művek Zrt. is an example of that, the share of the state in the banking sector.

91 Transport corporations, service provider corporations.

92 Basic Law Article 41, Act No 2013. CXXXIX.

93 Act No 2013. CXXXIX. paragraph 5. §, yet the same Act includes prescriptions different from general civil law regulations, for instance: ‘plc’ does not need to be indicated in the name of the company and the public company does not need to be registered in the company registry. Act No 2013. CXXXIX. point 5. § (2).

is non-negotiable.⁹⁴ The Hungarian National Property Management plc pursues state service, among others, executes proprietary rights over the state fortune.⁹⁵

However, the realization of the general prescriptions of civil law varies with respect to each one of the scenarios, and in fact the specific prescriptions affect relevant elements of the regulation; in the latter case of the MNB and the MNV Zrt., the prescriptions of civil law become restrained, while the specific prescriptions cover the operation exhaustively.

This classification is theoretical, yet this question does have an outstanding value in Hungary. Following the monolithic form of state property before the change of regime in 1989, it was necessary a transformation into business-property of the state in the framework of the public companies.⁹⁶ After the privatization in progress at the time of the change of regime, and also in the 1990s, the management of state property developed into its form known today. Thus, the organization for the management of state property has been created: both the Hungarian National Property Management plc (MNV Zrt.) and the municipalities can establish economic companies, certainly with the purpose of completing public assignment.⁹⁷ The state property can also be broken down into several constituents, a part of which makes the property of the state in the form of economic shareholding. Here the state can hold either minority or majority proprietorship. Both the management and the administration of this are treated by the MNV Zrt. Regarding its set-up, the MNV Zrt. treats nearly 550 shares, 279 are active companies, 270 are in majority state proprietorship.⁹⁸ As regards the municipalities, no such aggregate data are available.

VI. The Directive Rules of Public Companies

As regards the regulation, it can be generally concluded that to these companies also it is the Civil Code, and not the norms regulating the public companies, that are to be applied in general.⁹⁹ So, in this case, there is no difference. The specific prescriptions are to be found in the term of property management, included in the Act of Law on National Property, the Act of Law on State Property, and the Act of Law on the Local Self-Governments of Hungary. These acts of law regulate the terms and conditions of founding economic companies in general. Specific prescriptions apply to the organization structure, upon the basis of the directives of the Act of Law as per 2009. CXXII. This regulates the possible size of the board

94 Act No 2007. CVI. point 18. § (1).

95 Act No 2007. CVI. point 17. § (1) c).

96 For more details, see: Sárközy 2012.

97 On this, see: Act No 2011. CLXXXIX. point 41. § (8).

98 www.mnvzrt.hu.

99 For instance, Act No 2006. V. on corporate law regulations or Act No 1991. IL. also including the liquidation procedure rules.

of directors and the board of supervisors, and from a corporate governance angle the framework of the remuneration system has been set. To conclude, we can state that the provision of any public services may be realized in accordance with the general (Civil Code) regulations and the specific prescriptions applicable as a directive only to the organization.

The concern (group) situation disclosed in previous chapters may just as well be realized in various forms: examples are presented regarding contractual¹⁰⁰ concern. To the running of these, as well as to their internal regulation scheme, the general rules analysed in the first part of the present study are also applicable.

By examining the practice besides the applicable rules, we can draw a conclusion as follows. Decision-making for the group operation takes place on a public policy stage, and thus our present conclusions touch upon the system in force at the time of writing this study. In the fields of public utility services, there are active concerns (holdings) operating in the form of public limited companies like: Hungarian Electricity Works plc (Magyar Villamos Művek Zrt.), which as a group integrates nearly 20 separate economic companies through a control contract. Merging the state public utility services into one unified system started with the foundation of The First National Public Utility Service Provider plc (Első Nemzeti Közműszolgáltató Zrt.). A similar concern situation can be observed within the transport section, the Budapest Transport Centre plc (Budapesti Közlekedési Központ Zrt.), which fulfils the task of controlling the transport activities of the capital through the simultaneous joint governing of several companies. Volán Association (Volán Egyesülés) also operates within the transport sector, the associate companies of which are service providers of bus transportation operating in different regions of the country.¹⁰¹ The municipalities – in the capital and primarily in the cities of county level (e.g. Miskolc, Pécs) – run city management holdings.

VII. Is There a Specific Group Interest in Public Companies?

Examining these companies, we can draw the following conclusions from the point of view of group interest. In the case of city management holdings, it is a typical organizational model to operate with a unified central purchasing system, a finance and a management system, and that they also follow a unified HP-

100 MVM (Hungarian Electricity Works).

101 For instance: DAKK Zrt., ÉNYKK Zrt. (Hungarian regional transport centre companies in the form of plc-s).

policy; in other words, the parent company conducts the full range of the human actions of such companies. These are arranged and performed by the company on a group level. The control agreements include the right for the withdrawal of authority, that is: ‘the directorate of the controlling company has the right to withdraw any authority – either occasionally or permanently – from the management of the company under control, by its unilateral written statement and with immediate effect, in which case the action executed by the directorate of the controlling company through withdrawn authority, the thus concluded provision or exerted order directly obliges the company under control along with its employees’.¹⁰² As part of the proper operation subject to the unified business interest, the leading official of the company under control is obliged to carry out the management of the Company-under-Control in accordance with point No 3:55. in § (4) of the Civil Code (Ptk.) upon the basis set by the priority of the ultimate business interest of the acknowledged group of companies as a whole.¹⁰³

Considering the above shown examples and organizational models, it can be declared that in the case of Hungarian public companies it is not unfamiliar, however – in many cases, it has been a successfully implemented legal solution –, to function as an acknowledged group of companies. The legal framework of this is presented by the regulations of public law, on the one hand, and those of the Civil Code, on the other. Ever since the Hungarian change of regime, it has been a frequent subject of ongoing public policy debates how to efficiently arrange the public services of the state and what kind of optimal model can be devised relating to the private entrepreneur’s property of the state.

Both the above cases and the areas examined in the previous chapters show that in the case of public companies, regarding group-level functioning, both the regulations of civil law as well as corporate law are eligibly applicable. At the same time, the doubts disclosed therein, the argued standpoints present in the practice of law interpretations and jurisprudence are all still valid. Neither can it be nor shall it be necessary to segment the group interest in public companies. Hereby, we refer to the fact that some judiciary decisions fundamental to universal and not sectorial regulations (e.g. EBD 2013. P. 3.) are also related to public companies.

Nevertheless, as to our view, from one perspective, group interest does manifest differently from general regulations. The group-like cooperation of market players depicts a group interest that can be separated from the interests of

102 Pécs Holding City Property management plc publicized draft on control contract, point: 4.2.1.1. Available at: www.pecsholding.hu.

103 Ibid.: 4.3.2.2. point, and also Miskolc Holding Municipality Property Management plc foundation deed point: 15.3.

the controlling company. Yet, it completely fits into the market players' system of interest (economic companies).

This interest, however, bears a different meaning in public companies. The interest of the controlling company must typically – or ideally – fall in line with the public interest. This public interest is manifested in the organization that manages the proprietorship rights, and also in the status of the proprietor. In the case of the Hungarian National Property Management Company (MNV Zrt.), it is the parliament and government in power who bears the responsibility for making decisions along certain property policies. Behind the decisions of the holdings owned by the municipalities, there is the board of representatives, or, more precisely, the decision-making body who were granted legitimacy at the elections. This point of connection does not only explain the different content of the group interest but the identification of the group interest with the public interest as well. In our view, the question resulting from this is to what extent making any references to the public interest covers the group interest and to what extent the current regulation on group-level cooperation as prescribed by the Civil Code (Ptk.) can be applied to the relations of public companies with such peculiarities.

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